IN THE HIGH COURT OF JUDICATURE AT BOMBAY

ORDINARY ORIGINAL CIVIL JURISDICTION

ARBITRATION APPLICATION NO. 196 OF 2006

P.S. John,)
Proprietor of M/s. New Electricals, a Proprietory)
firm having their office at 60-C, 2nd Floor,)
Raj Industrial Corporation, Military Road, Marol,)
Andheri (East), Mumbai-400 059)...Applicants

Versus

M/s. Voltas Ltd.)
Company incorporated under the Companies)
Act, 1956, Voltas House-B, 3rd Floor, T.B. Kadam)
Marg, Chinchpokli, Mumbai-400 033)..Respondents

Mr. Suresh Kumar for the applicant.
Mr. G.R. Joshi with Mr. Avinash Joshi, instructed by M/s. Mulla & Mulla & Cragie Blunt and Caroe, for the respondents.

CORAM: **SWATANTER KUMAR, C.J.**

Judgment reserved on : September 21,2007
Judgment delivered on: 11th October ,2007

JUDGMENT:

The applicants have filed this application under Section 11 (6) of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as "the Act"), with a prayer that the disputes and differences that have arisen between the parties and as stated in their letter dated 10th August, 2006, be referred to arbitration in terms of the arbitration clause.

2. The necessary facts are that M/s. Voltas Limited had made certain enquiries and in response thereto, the applicants had submitted their offer vide letter dated 24th February, 2006. The terms and conditions were negotiated between the parties and a modified offer of the applicants was accepted by the respondents at a cost of Rs. 1,81,00,000/- stipulating the period of completion from 24th February, 2006 upto 15th May, 2006. This was subject to the conditions of tender document for electrical system between the owner and the respondents on back to back basis. The reference to the tender document and the arbitration clause contained therein thus amounted to an arbitration clause between the parties, according to the applicants. The work was awarded to the applicants by the Assistant General Manager, Special Project, (AC R BG), vide letter dated 24th February, 2006. In terms of clause 5 of the general conditions of the contract and the tender document, the disputes between the parties were required to be settled by arbitration. According to the applicants, the entire project was to be completed by 15th May, 2006, and after testing and commissioning the same was required to be handed over to the respondents. Upon completion of the work, the applicants have submitted their invoices right from the period 31st March, 2006 upto 5th August, 2006 for various

amounts. Having failed to receive the payments, vide letter Advocate's letter dated 10th August, 2006, the applicants called upon the respondents, by putting forth the true and correct facts, to settle the claims as stated in the letter, failing which to appoint an arbitrator as per clause 5 of the general conditions of contract on back to back basis. The respondents, vide their letter dated 29th August, 2006, disputed the existence of the arbitration clause and terminated the contract. This resulted in filing of the present application.

3. Even before this Court, the stand of the respondents is that there is no written binding arbitration clause between the parties and as such the question of referring any disputes to arbitration does not arise. The applicants have primarily relied upon the letter dated 24th February, 2006, by which their offer was accepted and awarded the contract to them. In order to substantiate their plea, they have relied upon the following clause of this letter:-

> " Supply of all other materials required to make the electrical system complete, as defined in tender documents; other than those mentioned above, shall be supplied by you."

4. Clause 5 of the general terms and conditions of the contract entered into between the respondents and their principals provides for reference of disputes to arbitration. The contention on behalf of the

applicants is that on the strength of the above clause, the tender documents would be the basis for adjudication. As the general terms have been referred to, the arbitration clause will be binding and applicable between the applicants and the respondents as well and the respondents are bound to act on the basis of the arbitration clause. The respondents by their reply dated 29th August, 2006, besides disputing the claims, had categorically stated that there was no arbitration clause in the contract between the parties and, therefore, the question of initiation of arbitration proceedings did not arise. The applicants have also relied upon the judgment of the Supreme Court in the case of *Groupe Chimique Tunisien SA* vs. *Southern Petrochemicals Industries Corporation Limited,* [(2006) 5 SCC 275] in support of their contention that when the contract incorporates an arbitration agreement by reference, the invoice need not contain a provision for arbitration. While accepting the plea and constituting an arbitral Tribunal, the Supreme Court held as under:-

> "7. The purchase orders placed by the respondent with the petitioner are the contracts between the parties and they are subject to FAI Terms which contain the arbitration clause. Sub-section (5) of Section 7 specifically provides that where there is reference in a contract (in this case, the purchase order) to a document containing an arbitration clause (in this case, FAI Terms), such reference constitutes an arbitration agreement, if the contract is in writing and the reference is such as to make that arbitration clause a part of the contract. The case squarely falls under Section 7 (5) of

the Act and there is an arbitration agreement between the parties as per clause 15 of FAI Terms.

8. The respondent next contended that in the invoices for the supplies, there is no reference to FAI Terms or arbitration agreement and, therefore, the disputes are not arbitrable. As noticed above, the purchase orders are the contracts. Invoice is a document which is prepared with reference to the supplies made under the contract. When the contract (purchase order) incorporates an arbitration agreement by reference, the invoice need not contain a provision for arbitration.

9. It is true that the petitioner had contended before the Jordanian court that there was no arbitration agreement between the parties. But the said contention was not accepted and the suit filed by the petitioner has been dismissed on the ground of want of jurisdiction. Thereafter, on considering the matter and taking legal advice, with reference to the contentions of the respondent, the petitioner has now proceeded on the basis that an arbitration agreement exists between the parties. If, on account of mistake or wrong understanding of law, a party takes a particular stand (that is, there is no arbitration agreement), he is not barred from changing his stand subsequently or estopped from seeking arbitration. (See U.P. Rajkiya Nirman Nigam Ltd. *vs*. Indure (P) Ltd., (1996) 2 SCC 667 where the contention based on estoppel was negatived while considering a reserve (*sic* reverse) situation."

5. As would be evident from the above, the purchase orders placed by the respondent with the petitioner are the contracts between the parties and they are subject to FAI Terms and thus the general terms and conditions were treated to be part of the contract between the parties and squarely fell under Section 7 (5) of the Act and arbitration

reference was made. This judgment of the Supreme Court has no application to the facts of the present case. The clause referred to in the document has restricted scope and application inasmuch as it was only for the specifications of the items to be supplied by the applicants to the respondents under its offer dated 24th February, 2006. There was no general clause accepting in toto that the principal terms between the respondents and their principals would be treated in its entirety as part and parcel of the contract dated 24th February, 2006. The language of Section 7 (5) of the Act is clear and it specifically states that the reference in a contract to a document containing an arbitration clause constitutes an arbitration agreement if the contract is in writing and the reference is such as to make that arbitration clause part of the contract. The language of the provision is unambiguous and clear and that even the reference clause has to be unambiguous and clear. The intention of the parties is to make their disputes referable to arbitration in accordance with the terms of the contract. The language of the clause aforereferred clearly shows that it was with regard to supply of materials as defined in the tender documents other than those which were specifically mentioned in the offer. This clause is incapable of being constructed as a general clause so as to make reference to an arbitration clause (i.e. Clause 5 of the General terms and conditions) in

relation to constitution of an Arbitral Tribunal. The arbitration clause between the parties is neither in writing nor makes reference to another contract containing arbitration clause in the true spirit and substance as contemplated under Section 7 (5) of the Act. The letter dated 24th February, 2006 should be construed on its plain language and cannot be unreasonably stretched so as to treat it as an arbitration clause by reference to another document. The argument raised on behalf of the applicants deserves to be rejected.

6. For the reasons aforestated, this application is dismissed, while leaving the parties to bear their own costs.

CHIEF JUSTICE